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18 **UNITED STATES DISTRICT COURT**
19 **DISTRICT OF NEVADA**

20 RAMON IZQUIERDO,

21 Plaintiff,

22 v.

23 EASY LOANS CORPORATION;
24 and Does 1-10, inclusive,

25 Defendant.

Case No.: 2:13-cv-01032-MMD-VCF

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO
STRIKE THE DECLARATION OF
RAMON IZQUIERDO**

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2 **I. INTRODUCTION**

3 Defendant Easy Loans Corporation (“Defendant”) filed its Motion to Strike
4 (the “Motion”) Ramon Izquierdo’s (“Plaintiff”) declaration submitted in support
5 of Plaintiff’s Reply to Defendant’s Opposition to Plaintiff’s Motion for Summary
6 Judgment. Defendant’s Motion, however, is simply a rehashing of the arguments
7 presented in Defendant’s Opposition to Plaintiff’s Motion for Summary Judgment
8 sprinkled with allegations that Plaintiff’s declaration is a “sham.”
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11 When Plaintiff offered clarity to Defendant’s questionable use of Plaintiff’s
12 deposition testimony, Defendant cried foul, claiming Plaintiff’s affidavit offered
13 new evidence that would “sandbag” Defendant. But Plaintiff’s declaration is
14 consistent with the verified Complaint, and only provides clarity to Defendant’s
15 questions that did not directly address pertinent in this case. No new evidence is
16 proffered, and Defendant’s Motion should therefore be denied.
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19 **II. PLAINTIFF’S DECLARATION DOES NOT PROVIDE NEW**
20 **EVIDENCE**

21 Defendant contends that allowing Ramon Izquierdo’s declaration would
22 somehow prejudice Defendant. Yet Defendant has not said *how* this declaration is
23 prejudicial. Defendant would have this Court believe new evidence was submitted
24 in Plaintiff’s declaration. However, Plaintiff’s declaration is not only consistent
25 with Plaintiff’s verified complaint, but it is simply a clarification of his prior
26 testimony due to Defendant’s vague questions that resulted in Defendant’s use of
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1 Plaintiff's answers as evidence of a material issue of fact in this case.

2 Defendant cites two cases for the proposition of striking "new evidence"
3 submitted in a reply. First, as already noted, Plaintiff's declaration contains
4 clarification of his testimony, which is consistent with the verified Complaint
5 Plaintiff filed under the penalty of perjury. Second, there Plaintiff's declaration
6 offers absolutely no new evidence, and therefore both *Linder* and *Pacquiao* are
7 inapplicable here.
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10 In *Lindner v. Ford Motor Co.*, 2012 WL 3598269 (D. Nev. Aug. 17,
11 2012)¹, the court struck from the reply *new documents and expert disclosure* that
12 exceeded the expert's previous analysis. The court in *Pacquiao v. Mayweather*,
13 2010 WL 3271961, (D. Nev. Aug. 13, 2010)² also struck *new documents* that
14 were filed with a reply brief. Both cases clearly involved new evidence. Here,
15 Plaintiff only provides a declaration that offers clarity to his deposition, directly in
16 response to Defendant's baseless assertions in its Opposition to Plaintiff's Motion
17 for Summary Judgment. Plaintiff's declaration offers no new evidence, and is
18 therefore distinguishable from *Lindner* and *Pacquiao*.
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22 **a) Plaintiff's declaration is consistent with his verified complaint**

23 Defendant's assertion that Plaintiff offers new evidence in his declaration is
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25 ¹ Defendant's citation was spelled "*Linder*" rather than "*Lindner*." Plaintiff could not find any
26 case as cited by Defendant, so Plaintiff assumes the case as cited by Plaintiff is the case
27 Defendant intended to cite.

28 ² Defendant's citation of "2012 WL WL 3271961" did not return any results. Plaintiff assumes
for this Opposition that Defendant meant to cite to *Pacquiao v. Mayweather*, **2010 WL**
3271961, (D. Nev. Aug. 13, 2010).

1 simply false. Rather, Plaintiff's declaration is consistent with the verified
2 Complaint Plaintiff filed under the penalty of perjury.

3 First, Plaintiff's declaration states Plaintiff obtained the credit card from
4 First USA Bank, otherwise known as Chase. *See* Declaration of Ramon Izquierdo
5 ("Izquierdo Decl."), ¶ 5; *see also* Complaint ¶ 8. Consistent with the Complaint,
6 Plaintiff's declaration clarified that charges on the card were primarily for family,
7 personal purchases or day-to-day living needs. *See* Izquierdo Decl., ¶ 9-10, 12, 14;
8 *see also* Complaint, ¶ 9. When Plaintiff stated he did not use the credit card for
9 business debts, taxes, or child support obligations, his statements were consistent
10 with his verified Complaint and offered for clarity since Defendant attempted to
11 raise the issue of exactly those types of purchases in its Opposition to Plaintiff's
12 Motion for Summary Judgment. *See* Izquierdo Decl., ¶ 7, 8, 13; *see also*
13 Complaint, ¶ 9.

14 Thus, it is clear that Plaintiff's declaration offers no new evidence.
15 Plaintiff's declaration is consistent with the verified Complaint he filed under the
16 penalty of perjury, and therefore the evidence offered is not new, despite
17 Defendant's contentions to the contrary. Since Plaintiff's declaration is consistent
18 with Plaintiff's verified Complaint, and no new evidence is offered, Defendant's
19 Motion should be denied.

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26 **b) Plaintiff's declaration merely provides clarification of deposition**
27 **testimony**

28 Defendant attempts to use Plaintiff's deposition testimony against him in

1 Defendant's Opposition to Plaintiff's Motion for Summary Judgment. But in
2 doing so, Defendant only refers to vague, off-point questions as evidence that
3 Plaintiff cannot prove his case. Defendant's Motion argues that Plaintiff is not
4 allowed to contradict prior testimony or discovery responses. Defendant, however,
5 is mistaken. During the taking of Plaintiff's deposition, if Defendant wanted
6 certain answers, Defendant had the duty to ask certain questions. Yet Defendant
7 chose to avoid specifics when it came to Plaintiff's charges on the credit card,
8 instead focusing on the date of purchases and whether Plaintiff remembered
9 specific purchases. Moreover, even if Plaintiff made an admission in his
10 testimony, they are not binding and may be clarified. *Sims v. Hughes*, No. CIV.A.
11 12-421, 2013 WL 1352278, at *1 (E.D. La. Apr. 2, 2013) addresses the fact that
12 admissions, even if directly stated in a deposition, are not legally binding, and
13 they may be clarified:
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18 "A judicial admission is a formal concession in the pleadings or
19 stipulations by a party or counsel that is binding on the party making
20 them." *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th
21 Cir.2001). It "may not be controverted at trial or on appeal." *Keller v.*
22 *United States*, 58 F.3d 1194, 1199 n. 8 (7th Cir.1995). "Although a
23 judicial admission is not itself evidence, it has the effect of
24 withdrawing a fact from contention." *Id.* It "is conclusive, unless the
25 court allows it to be withdrawn." *Id.* at 477. "***A statement made by***
26 ***counsel during the course of trial may be considered a judicial***
27 ***admission if it was made intentionally as a waiver, releasing the***
28 ***opponent from proof of fact.***" *Id.* at 476. "***By contrast, an ordinary***
evidentiary admission is merely a statement of assertion or
concession made for some independent purpose, and it may be
controverted or explained by the party who made it." *Id.* at 476-77
(citations and internal quotations omitted). "***When a party testifying***
at trial or during a deposition admits a fact which is adverse to his

1 *claim or defense, it is generally preferable to treat that testimony as*
 2 *solely an evidentiary admission.” Keller*, 58 F.3d at 1199 n. 8 (citing
 3 Michael H. Graham, Federal Practice and Procedure § 6726, at 536–
 4 37); *see also Siegrist v. Kleinpeter*, 2004 WL 797723 *2
 5 (E.D.La.2004) (Vance, J.) (“The deposition statement by Dr.
 6 Kleinpeter is an evidentiary admission, not a judicial admission. There
 is no indication that he made the statement as a formal concession
 with the intention of relieving plaintiff of the burden of proving the
 standard of care.”) (emphasis added).

7 *Id.*

8 Here, like in *Sims*, Plaintiff was simply clarifying the deposition testimony that
 9 Defendant, in its Opposition, attempted to use as evidence of admissions that
 10 Plaintiff could not prove his case. *See Izquierdo Decl.*, ¶¶ 4-14. The burden is on
 11 the questioner "to pin the witness down to the specific object of the questioner's
 12 inquiry." *US v Cowley*, 720 F.2d 1037 (9th Cir. 1983) (quoting *Bronston v. U.S.*,
 13 409 U.S. 352, 360, 362 (1973)).
 14
 15

16 Defendant, for good reason, never asked Plaintiff if he made the credit card
 17 charges for personal and/or household use. Instead, Defendant asked Plaintiff only
 18 if he could “pinpoint any of the exact purchases” made on the card. Plaintiff’s
 19 clarification that any charges made were for personal and/or household use is
 20 consistent with Plaintiff’s verified Complaint and not new evidence. *See Izquierdo*
 21 *Decl.* ¶ 11; *see also* Plaintiff’s verified Complaint (“Complaint”), ¶ 9.
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24 Instead of asking about the true issue, the charges made on the card, Defendant
 25 asked Plaintiff “[a]s you’re sitting here this afternoon, can you think of any
 26 specific dates that you actually used that card?” *See Izquierdo Decl.* at ¶ 10. The
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1 specific dates of use are not an issue to be proven. Plaintiff's Complaint not only
2 sufficiently alleges the card was used for personal, household and/or family
3 purposes³, but Plaintiff's declaration further clarifies that issue under the penalty
4 of perjury for the second time. Plaintiff's declaration merely clarifies the actual
5 issue, whether the charges made were for personal items, with a "yes," as there are
6 no other purchases Plaintiff would use the credit card for. Thus, Plaintiff's
7 declaration, which is consistent with the allegations of the verified Complaint,
8 presents no new evidence.
9

11 Finally, Defendant's Motion argues Plaintiff "now knows that the did not use
12 the Account for business purposes or a number of other purchases that are not
13 debts under the FDCPA." *See* Def.'s Motion, p. 5, ln. 25-27. However, during
14 Defendant's taking of Plaintiff's deposition, no mention of any of these uses was
15 made by Defendant. Defendant did not inquire about whether or not Plaintiff used
16 the card for any of those reasons. If Defendant wanted an answer to that question,
17 Defendant had the duty to ask. *See US v Cowley*, 720 F.2d 1037 (9th Cir. 1983).
18 Instead, Defendant used the fact that Plaintiff had not explicitly stated he never
19 used the credit card for these purposes as evidence that Plaintiff did not deny
20 using the card for such purposes. Therefore, it became necessary and natural for
21 Plaintiff to clarify through his affidavit that he never did, nor would he, use his
22 credit card to pay business debts, fines, tax liabilities or child support, because
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28 ³ Complaint, ¶ 9.

1 Plaintiff was did not have a business of his own, owed no fines or tax liabilities,
2 and had no pending child support to pay. *See* Izquierdo Decl., ¶ 13. Plaintiff's
3 clarification is again consistent with his verified Complaint, where Plaintiff
4 alleged the charges were for "family, personal or household purposes,"⁴ and
5 therefore adds no new evidence.
6

7 It is obvious that Plaintiff's declaration offers nothing new in the way of
8 evidence. The declaration remains consistent with the allegations in Plaintiff's
9 verified Complaint. Further, the declaration only serves to clarify Plaintiff's
10 deposition testimony in response to Defendant's questions that did not adequately
11 address the facts at issue in this case. Therefore, Plaintiff's declaration is not
12 prejudicial because it offers no new evidence, and Defendant's Motion to Strike
13 Plaintiff's Declaration should be denied.
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28 ⁴ Complaint, ¶ 9.

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2 **III. CONCLUSION**

3 Plaintiff's declaration is consistent with the verified Complaint he filed under
4 the penalty of perjury. Additionally, Plaintiff offers clarification of prior testimony
5 to rebut baseless assertions Defendant makes in its Opposition to Plaintiff's
6 Motion for Summary Judgment. Defendant failed to ask pointed questions in
7 taking Plaintiff's deposition. Plaintiff's clarification is not new evidence. For these
8 reasons, Plaintiff respectfully requests Defendant's Motion to Strike be denied.
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10 Dated: November 26, 2014

11 Respectfully submitted,

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13 **Kazerouni Law Group, APC**
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15 By: /s/ Danny J. Horen
16 Danny J. Horen, Esq.
17 Attorney for Plaintiff
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PROOF OF SERVICE

Pursuant to LR 5-1, I hereby certify that on the 26th day of November, 2014, service of the foregoing *PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STRIKE THE DECLARATION OF RAMON IZQUIERDO* was served via ECF to Defendant's counsel, addressed as follows:

Counsel of Record	Email	Party
Robert Qualey Dotson & Qualey 2320 Paseo Del Prado, B 205 Las Vegas, NV 89102	P: (702) 474-6677 rqualey@qualeylawfirm.com	Defendant
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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is a true and correct statement and that this Certificate was executed on the aforementioned date above.

BY: /s/ DANNY HOREN
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